

# **SUBCONTRACTING SOVEREIGNTY: THE COMMERCIALIZATION OF MILITARY FORCE AND THE FRAGMENTATION OF STATE AUTHORITY**

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...the unmistakable trend in the past several decades has been toward more and more private contracting, a hollowing out and deconstruction of the state that is in a sense the classic condition of postmodernity.<sup>1</sup>

## **I. INTRODUCTION**

In the last days of his second term in office in 1961, then United States President Dwight Eisenhower cautioned: “[i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. With the potential for the rise of misplaced power through the diffusion of authority to the market place, throughout much of the Cold War era, defense “military privatization” mainly involved the purchase of weapons and hardware from the private sector.

The end of the Cold War in early 1990s however produced dramatic changes in the relationship of the nation-state to the private exercise of force. With the demise of an active Soviet military threat, many major military powers in the West including the remaining sole superpower—the United States—embarked on an ambitious program of downsizing and privatizing the military. At the heart of the privatization initiative was the imperative to reinvent and streamline government, and cut military costs. The net result was that the world’s major powers—the traditional actors in regional and intrastate conflicts during the Cold War bipolar era—decreased interference in many conflicts.<sup>2</sup> The consequence was that geopolitical power gradually diffused leaving power vacuums

affording Private Military Firms (PMFs) a golden opportunity to proliferate and fill the same.<sup>3</sup> The net result of the shifting geopolitical paradigm was particularly evident in weak Third World countries where governments increasingly sought private military resources to fulfill and/or augment their security needs.<sup>4</sup>

With downsizing gathering pace, tighter military budgets resulted in the displacement of military personnel and an increase in underutilized military personnel.<sup>5</sup> This resulted in a huge surplus of military expertise which soon flooded the market place.<sup>6</sup> With retired members of Special Forces, and general combatants readily available, the hiring of robust, effective privatized armies was now a reality. In an interesting or perhaps inevitable metamorphosis of the free market ideal, there was a rapid proliferation of new PMFs while existing ones broadened the range of services to harness the surplus expertise.

The post-Cold War rise of new PMFs and the re-invention of existing ones saw the provision of services that have traditionally been regarded as inherently governmental. In the past decade and a half, the national and international security landscape has been transformed resulting in the fragmentation of governmental authority and a 'subversion' of state sovereignty. The decentralization of international security from state-organized militaries threatens the traditional Westphalian paradigm of the state as the natural entity in control of the legal use of lethal military force. Tucked on to this emerging phenomenon is the reality that PMFs accentuate the inability of international law to hold private actors accountable.<sup>7</sup>

While the rise of the post-Cold War PMF may be seen as a success for the globalized free market place, these "[PMFs] represent a reconstituted form of organized corporate mercenarism that is responding to the need

for advanced military expertise<sup>8</sup> PMFs now support numerous military operations throughout the world: they provide support to counter-drug operations in Colombia, are dominant in the military operations in Iraq and Afghanistan, and act as crucial components in enhancing the capabilities of many unstable Third World countries. Within the military establishment of countries whether small, medium or large, thousands of PMF technical experts operate communications systems, maintain military aircraft, fix weapons systems, link troops to command centers and in several cases train national armies. PMFs are now in a position to amass unchecked power to affect conflict resolution, world economic stability, and geostrategic negotiations.<sup>9</sup> As ‘corporate mercenary’ firms become larger, they are entrenching themselves as key players in the crucial sovereign function of use of military force and now stand in a position to increasingly influence and/or engage in decision-making processes traditionally exercised by politicians and government entities.<sup>10</sup>

Although resembling their antecedents in form, PMFs have quickly developed a modus operandi compatible with the needs and strictures of the post-cold war, state-based international system, leading to both implicit and explicit legitimacy. Explicit legitimacy is based on the increasing use of PMFs by countries which lends this outfits a serious veneer of legitimacy while implicit legitimacy is derived from a lack of vociferous condemnation. To consolidate their legitimacy, PMFs have taken considerable steps to upgrade the image of what has historically been an unsavory profession. Contemporary PMFs are now incorporated businesses listed on the world’s major stock exchanges<sup>11</sup> with employees often recruited from among the most decorated echelons of various military establishments.

Privatization of military functions has introduced a range of constitutional, economic, and strategic concerns that have a significant impact on the role of government and the execution of its functions, since use of PMFs contradicts the concept of the state as an entity monopolizing military force. Commenting on the decentralization of state control over the use of force, William W. Keller notes: “This change in military relationship between states and private entities suggests that some states no longer exert explicit control over military technology or manpower. Military skill is becoming increasingly privatized and commodified.”<sup>12</sup> Apart from thorny legal issues raised by the commodification of military force and in particular the influence of PMFs in both formal and informal decision-making in governmental circles, the reality is that the scale upon which PMFs can inflict violence rivals that of many sovereign nations..

This Article has as its central theme the decentralization of the state’s control over legitimate military force with the consequential diffusion of governmental control that stands to fragment state sovereignty. It argues that the increasing centrality of PMFs to the prosecution of war is creating a changed national security landscape with PMFs increasingly influencing governmental policy both overtly and covertly. PMF heads many of whom are former high ranking military and civilian personnel now advise governments and in some cases sit on government advisory boards. Additionally they also offer governments a conduit for pursuing covert foreign policy aims and circumvention of various legislative and legal oversights. The formidable military capability of PMFs and the growing reliance of state militaries on their services means that PMFs’ now stand to threaten, if not influence governments.

## **II. WAR MART: THE RISE OF THE FOURTH ARM OF GOVERNMENT?**

On 10 September 2001, Secretary of Defense Donald Rumsfeld announced an “all-out campaign to shift [the] Pentagon’s resources from bureaucracy to the battlefield, from tail to the tooth.”<sup>13</sup> Having outsourced much of the logistical and supply functions of the military to private firms, he declared that the Pentagon would be challenged to eliminate or shift to private suppliers all but the core activities of defense.<sup>14</sup> With the vision of privatizing United States military arsenals, its ammunition plants, and its repair depots, Rumsfeld also announced a commitment to ensuring that the Pentagon should learn from, and take advantage of, the private sector’s expertise in management, technology, and business.<sup>15</sup>

The wide-ranging nature of the privatization initiative is evidenced by the fact that in the run-up to the second Gulf War, dubbed “Operation Iraqi Freedom,” the Army announced that it would permit contractors to compete for 154,910 civilian jobs as well as 58,727 military positions.<sup>16</sup> Today in Iraq, there are over 20,000 military contractors serving in capacities which include core military functions such as airborne operations, provision of air support for ground troops and convoys, counterinsurgency work, force integration, tactical and strategic intelligence, reconnaissance, security assistance, and weapons control.<sup>17</sup> Both the Clinton and Bush administrations were adamant that the post-cold war downsizing initiative would not intrude on any functions that are “inherently governmental.”<sup>18</sup> This pledge was a hollow promise.

Reliance on PMFs has allowed these companies to increase in size and scope. Revenues pouring into private military companies have led the

stock in publicly traded PMFs to skyrocket.<sup>19</sup> Thus, it is no surprise that in 1999 and 2000, ArmorGroup, a leading United States private military corporation, was listed by Fortune 500 as one of the 100 fastest growing companies.<sup>20</sup> Against this background, there was a series of mergers and acquisitions that created larger firms and an appetite for “war profits,” as members of the public snapped up shares.<sup>21</sup> With billions up for grabs, PMFs have developed serious networks with military insiders in various Western capitals by funneling millions of dollars into lobbying.<sup>22</sup> Wayne Madsen commenting on the changing security landscape in the United States notes that PMFs’ relations with government is so cozy that some of the generals who have exchanged military fatigues for pinstripe suits seem to be in charge of numerous operations, often in conjunction with the United States Central Intelligence Agency (CIA) with presidential approval.<sup>23</sup>

PMFs now have an active role both formally and informally in advising governments on various military policy initiatives. In 2000, Lockheed Martin Vice-President Bruce Jackson was a key player in the Project for the New American Century, an organization that helped draft the Republican Party’s foreign policy platform. Three years later, when the military campaign in Iraq got underway, Lockheed Martin benefited to the extent of \$21.9 billion in contracts and war profits from just about every phase of the war, and its stock tripling as a direct result.<sup>24</sup> Lockheed Martin strictly speaking is not the archetypal PMF; rather its origins and operations are centered on the ‘traditional’ defense industry firm. However, this bright line distinction dissolves when one considers the interrelation of PMFs and defense industrialists. Many American PMFs are actually divisions or subsidiaries of prominent defense industry businesses such as Northrop-Grumman, Booz Allen Hamilton, the Carlyle Group, and Bechtel.<sup>25</sup>

Shareholder pressure is a key fact in steering the ‘traditional’ military-industry complex to acquire PMFs and snare their lucrative source of income—millions of government dollars literally doled out through blank cheques. Consider for instance that in 2004, Halliburton, the giant United States multinational firm specializing in energy services faced a bleak future after posting a \$280 million loss two years before. However, Halliburton’s share price was soon rocketing, in part due to the Iraq contracts (a ‘cash injection’ of \$1.4 billion)<sup>26</sup> and in part due to a merger with Kellogg Brown and Root (KBR)—a well-established PMF.<sup>27</sup> Perhaps in a cynical statement by the author Halliburton’s return to serious profit was a miracle—the reality is that the company had a guardian angel in the form of Dick Cheney (a former director at Halliburton and Chief Executive Officer from 1995–2000), the current occupant of the American Vice-Presidency<sup>28</sup>

The clout of PMFs and their increasing political influence is evident when one considers that in 2004, of the 30 members of the Defense Policy Board—the influential Pentagon advisory panel—at least nine were directors or officers of companies that won \$76 billion in defense contracts in 2001 and 2002.<sup>29</sup> Former Secretary of State George Schultz—who had a role as a director of a leading PMF, Bechtel—was also the chairman of the advisory board of the Committee for the Liberation of Iraq, a fiercely pro-war group with close ties to the White House.<sup>30</sup> Bechtel has benefited and continues to benefit very handsomely from the Iraq war. While some might see such occurrences as mere coincidence, the pattern becomes pronounced when one considers that Halliburton has also been the recipient of many multi-million dollar contracts through a flawed tendering system.<sup>31</sup>

Leading PMF contractors in the United States have donated millions of dollars to political causes, primarily to the Republican Party.<sup>32</sup> Although

it is not illegal for business corporations to contribute to the political process, such practices beg the question of whether military contractors should, as a matter of policy, have significant influence in choosing political leaders or influencing governmental policy.<sup>33</sup> Currently, scores of high-profile, multi-million dollar contracts to rebuild Iraq and Afghanistan and to modernize and upgrade United States weaponry have been awarded to PMFs with particularly close ties to government decision makers. It is becoming evident that the union of government officials and defense industrialists is aligning government policy with financial interests.<sup>34</sup>

### **III. SOVEREIGNTY—TWISTING AND FRAYING? BEHOLDEN TO A NEW FRANKENSTEIN**

Despite the state's conventional definition as that entity holding a monopoly on the legal use of force, prior to the twentieth century this arrangement has not always been so. "Until the mid-nineteenth century, military knowledge and labor were an alienable commodity in an international market. Sovereignty bore little or no relation to the control of organized military violence."<sup>35</sup> In the nineteenth century as European states bureaucratically matured, their capability to organize violence increased tremendously,<sup>36</sup> and states aggressively pulled military violence within their control in processes of centralization and legal monopolization.

The maturation of the concept of nation-state sovereignty meant that the recruitment of foreigners for duty in national armies declined, and the utility of mercenaries was eclipsed by national armed forces. By the turn of the twentieth century, most European states had effectively consolidated military monopoly within their territorial realms. By the mid-twentieth century international law outlawed mercenarism.<sup>37</sup> The

individual self-seeking mercenary was now an abhorrent participant in the international military marketplace since the state had moved away from commodification of violence.<sup>38</sup> However corporate mercenarism exemplified through the rise of the post-Cold War PMF has not only resulted in the commodification of military violence, it has brought self-seeking war profiteers back into the game this time with implicit and explicit governmental support as noted above. As Ken Silverstein notes: “[t]he only difference between what these firms [PMFs] do and what mercenaries do is that the companies have gained the imprimatur of government for their actions.”<sup>39</sup>

### **A. Constitutional Frameworks under the Heel of Market Power**

Private warriors owe their first allegiance to private bosses, not to any government. The utilization of private agents often acts as a shortcut around traditional means of decision-making, often distorting the democratic process. This compromises the strategic and physical security of nations and the confidence of the citizenry in the democratic practices and institutions of the nation. In the United States, for example, one of the key issues is that PMFs, though backed with public dollars, operate without congressional notification, oversight, or approval. They accomplish public ends through private means, allowing governments to carry out actions that would not otherwise be possible, such as those that would not gain legislative or public approval. While this might seem to cast PMFs in at least some sort of positive light, more worrisome from a policy standpoint is the question of lost control. Even when contractors do military jobs, they remain private businesses and thus fall outside the military chain of command and justice system. The freedom of PMFs to operate without legislative or legal oversight disconnects the public from governmental policy and reduces the citizenry’s ability to influence government policy, undermining the role of popular sovereignty.

The ability to outsource combat roles necessarily carries with it opportunities for the executive to wield powers unimaginable if it were limited to the use of regular troops. By shifting responsibilities away from national armed forces and delegating them to private contractors, the executive can circumvent constitutional obligations. Lack of oversight lengthens the leash of the executive in conducting national security policy and concomitantly limits the effective transmission of information to the citizenry. Privatization may thus destabilize the balance of power-sharing and generate a sense of disenfranchisement among the population—a failure of democratic legitimacy. There is thus an important debate about whether or not democratic norms apply to privatization. Certainly a strong case can be made that they do, in which case privatization invites the public to wonder whether decisions for military intervention are influenced by the PMFs who supply the weaponry and services.<sup>40</sup> The reduction in transparency conflicts with the concept of limited government and raises deep concerns about the long-term health of democracy and limited government.

The often cited benefits of cost-savings and economic efficiency in privatization of military functions mask more troubling realities. Outsourcing and the growing appetite for PMFs has more to do with a range of hidden agendas. How else would governments particularly in the West allow this outfits to frequently overcharge and often under-deliver yet seem determined to cling onto the chorus of PMF utility in economic efficiency and cost saving? The reality is that outsourcing military services to PMFs creates opportunities for the Executive to unilaterally circumvent legislatures and other substantive and procedural safeguards in military affairs. Commenting on this issue with regard to the United States, Professor Jules Lobel suggests that engagement without U.S. troops could be a shortcut around “democratic decision-

making that distorts the democratic process and is fundamentally incompatible with the demands of our constitutional system.”<sup>41</sup> This may appear to be an overly pessimistic stance but that is put in perspective when one considers that that in the case of the Balkan conflict, the use of Military Professional Resources Inc. (MPRI) a leading American PMF in military operations was acknowledged and tacitly approved by the Clinton administration both Croatia and Bosnia constituted. This created a covert avenue to pursue American foreign policy interests. The ramifications of this trend as well as details of the Balkan ‘sham’ are addressed in greater detail in the following section of the Article.

## **B. The State Runs Out Of Puff: Foreign Policy in the Grip of Market Power**

PMFs are often a primary vehicle through which states utilize covert violence to pursue foreign policy objectives. While PMFs are companies and therefore private entities disconnected from the state, they have become in a sense a type of state agent—tied to their home state by tacit or licensed approval for their activities and enlisted as contractors for the employing country. The close relationship between PMFs and Western governments, and their use as agents of, or substitutes for, foreign policy is a matter of concern. Governments have not been averse to hiring PMFs to assist foreign governments, and use such companies’ services as a bargaining chip in negotiations with these governments.<sup>42</sup> Juan Carlos Zarate notes that the attractiveness of PMFs as a foreign policy instrument has to do with the reality that

...countries which recommend or export them arguably can disavow any connection to SCs [Security Companies, referred to as PMFs in this article] activities. Potentially, this allows exporting governments to use SCs as political pawns to affect the internal affairs of a country or region while retaining their official neutrality in such conflicts.<sup>43</sup>

Governments increasingly employ private companies to help advance national foreign policy goals that they wish accomplished, but hesitate to do themselves. In the mid-1990s, the United States firm MPRI (introduced above) furthered the United States' goals in the former Yugoslavia. The Clinton administration was hamstrung by UN arms embargos and thus militarily limited in its ability to help quell the blood bath occasioned by the disintegration of the former Yugoslavia. Unable to provide direct assistance, the United States turned to private solutions. It bolstered the fledgling Croatian state by arranging for MPRI to provide strategic and tactical military training. Later, to entice the Bosnian Muslims to accept the Dayton Peace Accords, the Clinton administration played matchmaker by recommending MPRI's services.<sup>44</sup> This allowed the U.S. government to purchase strategic outcomes at a much lower political cost.

At first blush the Balkan scenario presents a positive utility that PMFs offer but this quickly washes away when one considers that in using MPRI, the Clinton Administration covertly but actively broke a UN sanction by training Croatian forces and offering direct assistance underwritten by taxpayers' dollars.<sup>45</sup> UN sanctions were further violated when Croatia transferred weapons received from MPRI to other regions of the former Yugoslavia despite an existing arms embargo that the American government had voted for in the UN Security. In working "under the guise of a private commercial enterprise, MPRI could achieve what would otherwise be impermissible military objectives."<sup>46</sup> The United States's use of MPRI effectively permitted it to remain neutral yet still pursue its unilateral humanitarian and geostrategic interests in the region. Subsequently in devouring its cake, yet keeping it.<sup>47</sup> The United States carried out a covert foreign policy agenda screened from public scrutiny and congressional oversight when it intervened in Kosovo. The

intervention was made possible in large part through the enlistment of the services of a PMF—KBR—which reduced American troop supply in the Balkans by an estimated 8,900.<sup>48</sup>

The use of PMFs is pervasive across many countries and regions. In Latin America, PMFs presently make up roughly 20 percent of the American military personnel assisting the Colombian security forces in the ongoing military campaign against drug cartels and Marxist guerilla rebels, at a cost running into hundreds of millions of dollars.<sup>49</sup> In yet another unsettling manifestation of the power and increasingly essential nature of PMFs, in 2003 DynCorp military contractors spirited U.S. diplomats through Palestinian-controlled Gaza, a task that has traditionally been the exclusive responsibility of the State Department Diplomatic Service agents and/or the United States Marines.<sup>50</sup> This may appear to be a feather in the cap for the utility of PMFs however when one considers the other side of the coin, the outsourcing of sovereignty and the diffusion of military authority is obvious considering that the Marines were effectively sidelined in the operation, and instead the command and control of the operation was vested in a PMF.

The ambiguity with which governments deal with PMFs obscures the questionable legitimacy of some of their activities. PMFs claim to be public benefactors, serving only recognized governments, bringing peace and order where there is anarchy and violence, and thus establishing the basic conditions for development. For example, one leading PMF, Blackwater Security Consulting, notes on its website that it provides “a new generation of capability, skills, and people to solve the spectrum of needs in the world of security.”<sup>51</sup> Another, CACI International—at the centre of the prisoner abuse scandal at Abu Ghraib Prison in Iraq—notes that its solutions “lead the transformation of defense and intelligence,

assure homeland security, enhance decision-making, and help government to work smarter, faster, and more responsively.”<sup>52</sup>

Small- and medium-sized governments have reason to be wary of PMFs. The services that they offer are so vast and well-heeled that they have the ability to face-off militarily with states and dictate, through their extensive involvement, changes in government. This is manifest in the “rent-a-coup” scandal involving the son of a former British Prime Minister. Logistics, a British-South African PMF, was accused of plotting to overthrow Equatorial Guinea’s government. Several “failed” or “failing” states have relied almost exclusively on private actors to perform both international and domestic roles of government.<sup>53</sup> Executive Outcomes, a South African PMF, helped the Sierra Leone government fend off rebel advances in 1995–96<sup>54</sup> and then had a hand in appointing an interim head of government.<sup>55</sup> Later in the 1990s, the British High Commissioner in Sierra Leone, acting under the apparent authority of the British Home Office, contracted Sandline, a British PMF, to train and equip a local force for the purpose of reversing a coup which had resulted in a military junta’s ascendance to power.<sup>56</sup> Sandline undertook the activity, which included shifting tons of armaments to the country. Subsequently, the elected president was restored to power.

When the role of the British government and Sandline came to light, there was a huge public uproar which quickly crystallized into the “Arms-to-Africa” scandal. The Legg Inquiry was set up by the Foreign Secretary in response to parliamentary and public criticism over the role of the British Foreign Office in sanctioning the intervention of a PMF in Sierra Leone to defuse the sensational saga.<sup>57</sup> The Legg Report mildly rebuked Peter Penfold—the British ambassador to Sierra Leone—whose complicity in this affair was beyond dispute. The report noted in a nonchalant manner that he ought to have been “sufficiently conscious of

political and public unease about mercenaries.”<sup>58</sup> It went on to clear other officials by describing their role/activities in ambiguous, non-critical language.<sup>59</sup> In addition, the Legg Report treated private military companies simply as commercial organizations that “are entitled to carry on their business within the law and, for that purpose, to have the access and support which Departments are there to provide British citizens and companies.”<sup>60</sup>

With the utility of PMFs apparent and their goods and services becoming increasingly indispensable to the waging of war, governments seem to be moving towards to think of PMFs not in terms of suppression, but of regulation. For example, United Kingdom Minister of State Baroness Symons, in charge of International Security, among other responsibilities, told the House of Lords in 1998 that the U.K. government was examining a number of options for national, domestic regulation of PMFs operating out of the UK.<sup>61</sup> Essentially, this policy initiative granted PMFs legitimacy. The UK position is readily apparent in initiatives by other Western governments in which the bulk of the PMFs are incorporated. One cannot help but notice that in the few countries where legislation or guidelines have been passed in relation to PMFs, they do not seek to make such enterprises illegal; rather, they impose conditions requiring specific approval from designated government bodies before any operation can be embarked upon.

### **C. International Order & Rule under Siege**

A great deal of genuine alarm has been generated by the lack of oversight of PMFs and their ever-increasing role in the prosecution of war. As Iraq demonstrates, there are numerous issues pertaining to the operations, contracting, and rules governing the operation of PMFs. This is complicated even further as their largely unregulated activities span a

number of fields ranging from police, paramilitary, and military training to logistics and protection of installations and officials.<sup>62</sup>

It may be argued that the multitude of the UN General Assembly's resolutions and their repeated appeals for governments to restrict the supply and demand for mercenaries is evidence that states have obligations under international law to both criminalize and punish mercenaries. The concern of the General Assembly arises principally from the rise in the use of PMFs in Africa, where they have had a deleterious impact on the ability of states to maintain order and encouraged the militarization of civil society and rapid growth in small arms markets. However, in the often frustrating and politically-driven law-making process in the international system, matters are not as clear-cut as this. A number of factors militate against the argument that the resolutions posit legal obligations. First, many of the General Assembly resolutions address particular conflicts. Secondly, the General Assembly resolutions are broader in scope than established, customary international norms. Thirdly, "under the UN Charter, the General Assembly has no authority to enact, alter, or terminate rules of international law."<sup>63</sup> Lastly, "General Assembly resolutions do not necessarily constitute international law. Instead, resolutions from the General Assembly...may only represent the crystallization of customary international law or evidence of state practice and *opinio juris*."<sup>64</sup>

The conundrum presented by PMFs is that "the international laws of war that specifically deal with their presence and activity are largely absent or ineffective."<sup>65</sup> Although the United Nations attempts to regulate the behavior of nation-states and their national militaries, it (as is often the case with international law) has comparatively little influence over the activities of private agents in comparison to individual governments. This situation exists primarily because "the existing laws do not

adequately deal with the full variety of private military actors. Human rights concerns are particularly significant.<sup>66</sup> This is so considering that often in the face of the reality of guaranteeing customer satisfaction PMFs can find their operations in conflict with the need to avoid grave human rights violations.<sup>67</sup> A few examples suffice: the use of fuel air explosives—a highly effective but particularly tortuous weapon—in Angola by Executive Outcomes,<sup>68</sup> the use of untrained PMF personnel in Iraq that resulted in the widely publicized Abu Ghraib prisoner scandal in Iraq and the use of PMFs by the American government in the terrorist rendition program.

In the well publicized and sensational prisoner scandal at Abu Ghraib in Iraq, the United States military hired private intelligence personnel from California Analysis Center, Incorporated, (CACI), a PMF often referred to as “Colonels and Captains, Inc.” by critics<sup>69</sup> to interrogate prisoners. The personnel were hired under a standing “blanket purchase agreement” between the Department of the Interior and CACI, negotiated in 2000.<sup>70</sup> The contract however did not require CACI to comply with international law norms. This was brought to light in 2004 after an investigation by the United States Army Inspector General which concluded that 35% of CACI’s Iraqi interrogators did not have any “formal training in military interrogation policies and techniques.”<sup>71</sup> More damning is the revelation by one of the interrogators that “cooks and truck drivers” were hired because the private company was “under so much pressure to fill slots quickly.”<sup>72</sup>

Turning to another front, even the ‘War on Terror’ has not been spared. The tentacle of the PMF are manifest in the new emerging practice of the United States government labeled rendition—an extraordinary scheme involving the transfer of terrorism suspects to third countries that harbor no qualms about using all manner of processes and procedures to

‘extract information’. The United States has frequently used private contractors to transport terrorism suspects to countries known to practice torture.<sup>73</sup> Since September 11<sup>th</sup>, the number of renditions has grown, and hundreds of terrorist suspects have been deposited indefinitely predominantly in Egypt whose secret police force, the Mukhabarat, has a reputation for brutality. As in the case of the Abu Ghraib abuse, the Convention Against Torture prohibits governments from taking such actions however the ambiguous legal status of PMFs under existing international law offers leeway for countries to not only bend but also to occasionally to breach their international legal obligations thus threatening the very fabric on the international legal order.<sup>74</sup>

#### **IV. CONCLUSION**

A century ago, sociologist Max Weber identified the state as that entity which “successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order.”<sup>75</sup> Weber’s assertion is based upon two general ideas. First, the rise and maturity of the modern nation-state and its nationalistic credo of patriotic armed forces is a symbol of national security and governmental authority in defending its territory and citizenry. Secondly, the nature of military skill and its underpinnings—the management and deployment of violence—is very state-centered. There is little doubt that the privatization of force affects the role of the state in the regulation of violence. The failure to have direct regulation of violence means that the state’s monopoly of military force is fragmented. The dramatic growth in private security challenges the international state system’s three hundred year control over military might.

Furthermore, PMFs raise the thorny issue of the future of the military itself. The armed services have long seen themselves as engaged in a

unique profession, set apart from the rest of civilian society, which they are entrusted with securing. The rise of PMFs, and their recruiting from within the military itself, challenges that uniqueness by allowing encroachment by the civilian marketplace. PMFs now compete directly with the government, drawing employees from the military by offering higher pay, which ironically comes from public funds. This reality is particularly poignant when one considers that even the U.S. military, the world's most dominant force, is increasingly reliant on PMFs: in the past decade alone, the Pentagon entered into more than 3,000 multi-million dollar contracts with Private Military Firms.

The heavy reliance on PMFs has contributed to increased private contractor presence on the battlefield.<sup>76</sup> Many states (small and major) now rely on them for long-term support for major defense systems.<sup>77</sup> With technologically advanced systems requiring PMFs being responsible for long-term support, military establishments are losing the capacity to manage and generate the ability to maintain key components of war including not only command systems but also military communication systems and surveillance apparatus.<sup>78</sup> PMFs are thus becoming the key supporting actors of military operations, and now stand in a position to eventually threaten global order with military force that is less accountable and controllable than state militaries.<sup>79</sup> Signs of the decline of the nation-state and the growing role of private military companies are symptoms of a large, dangerous challenge to the aspirations of order in the world, an order represented by the system of nation-states and the rule of law.<sup>80</sup>

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<sup>1</sup> Laura A. Dickinson, "Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law," *William and Mary Law Review* 47 (2005): 135, 141.

<sup>2</sup> See Juan Carlos Zarate, "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder", *Stanford Journal of International Law* 34 (1998): 75, 76.

<sup>3</sup> Tina Garmon, "Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under The Alien Tort Claims Act", 11 *Tulane Journal of International and Comparative Law* 11 (2003): 325, 328.

<sup>4</sup> David Shearer, "Outsourcing War", *Foreign Policy* (1998): 68, 70.

<sup>5</sup> P.W. Singer, "Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security", 26 *International Security* 26 (2001/02): 186,193

<sup>6</sup> Garmon, "Domesticating International Corporate Responsibility", supra note 3 at 329.

<sup>7</sup> See Ariadne K. Sacharoff, "Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?" 23: *Brooklyn Journal of International Law* 23 (1998) 927, 929.

<sup>8</sup> See Zarate, "The Emergence of a New Dog of War", supra note 2 at 81-82.

<sup>9</sup> Garmon, "Domesticating International Corporate Responsibility, supra note 3 at 327.

<sup>10</sup> See Eric W. Orts, "War and the Business Corporation", *Vanderbilt Journal of International Law* 35 (2002): 549, 556-557.

<sup>11</sup> Many PMFs are actually divisions or subsidiaries of such prominent businesses as Northrop-Grumman, Booz Allen Hamilton, the Carlyle Group, and Bechtel. See Jon D. Michaels, "Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War," *Washington University Law Quarterly* 82 (2004): 1001, 1023.

<sup>12</sup> Montgomery Sapone, "Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence", *California Western International Law Journal* (1999): 1, 19-20.

<sup>13</sup> Secretary of Defense Donald H. Rumsfeld, Speech for DOD Acquisition and Logistics Excellence Week Kickoff, "Bureaucracy to Battlefield," 10 September, 2001.

<sup>14</sup> *Ibid.*

<sup>15</sup> Rumsfeld explained:

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Already we have made some progress. We've eliminated some 31 of the 72 acquisition-related advisory boards. We now budget based on realistic estimates. We're improving the acquisition process. We're investing \$400 million in public-private partnerships for military housing. Many utility services to military installations will be privatized. We're tightening the requirements for other government agencies to reimburse us for detailees, and we're reviewing to see whether we should suspend assignments where detailees are not fully reimbursed. We have committed \$100 million for financial modernization, and we're establishing a Defense Business Board to tap outside expertise as we move to improve the department's business practices.

Ibid.

<sup>16</sup> Daniel Guttman, "Public Purpose and Private Service: The Twentieth Century of Contracting Out and the Evolving Law of Diffused Sovereignty", *Administrative Law Review* 52 (2000): 859.

<sup>17</sup> Todd S. Milliard, "Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies", *Military Law Review* 176 (2003): 1, 11-12; Michaels, "Beyond Accountability", supra note 11 at 1003-4.

<sup>19</sup> "[A]ccording to political scientist Deborah Avant, approximately thirty cents of every dollar spent by the U.S. military in Iraq winds up in the coffers of the more than one hundred private military corporations supporting U.S. troops there." Quoted in James R. Coleman, "Constraining Modern Mercenarism", *Hastings Law Journal* 55 (2004): 1504.

<sup>20</sup> Harry Magdoff et al., "Notes from the Editors," *Monthly Review*, May 2004.

<sup>21</sup> This is not to suggest that the public is complicit in the industry but rather PMFs offer a good return on investment and often the average individual may be unaware that the shares they're purchasing from listed reputable companies link them to their PMF subsidiaries. See supra note 11.

<sup>22</sup> Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, NY: Cornell University Press, 2003); Nelson D. Schwartz, "Pentagon's Private Army", *Fortune*, 17 March 2003, 100, 102. Publicly traded stocks in private military companies jumped roughly fifty percent, making this one of the few industries whose economic outlook improved after 9/11.

<sup>23</sup> Wayne Madsen, "Mercenaries in Kosovo: The U.S. Connection to the KLA", *The Progressive*, August 1999, at 29, 31.

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- <sup>24</sup> Niloufer Bhagwat, "The Privatization of War", 28 June 2005, *World Tribunal on Iraq* (WTI) available at <http://www.globalresearch.ca/index.php?context=viewArticle&code=BHA20050628&articleId=538> (last visited 30 March 2006).
- <sup>25</sup> Michaels, "Beyond Accountability", supra note 11 at 1023.
- <sup>26</sup> See Andrew Park & Lorraine Woellert, "Halliburton: Halfway Home?" *Business Week*, 23 December 2002, at 54.
- <sup>27</sup> "Halliburton Posts 2nd-Qtr Profit. Reversing Loss", *Forbes*, 31 July 2003, available at <http://www.forbes.com/home/newswire/2003/07/31/rtr1044428.html> (last visited 15 April 2006).
- <sup>28</sup> Dick Cheney still holds stock options (worth hundreds of thousands to exercise) at Halliburton. Cheap shot or not (to recall his reaction to this fact) there is too much stink in the air for it not to smell. See generally, Naomi Klein, "Bomb before You Buy: The Economics of War", *Seattle Journal for Social Justice* (2004): 331, 336.
- <sup>29</sup> Bryan Bender, "Study Finds Cronyism in Iraq, Afghanistan Contracts", *Boston Globe*, 31 October 2003.
- <sup>30</sup> Bob Herbert, Editorial, "Spoils of War", *New York Times*, 10 April 2003.
- <sup>31</sup> Erik Eckholm, "A Top U.S. Contracting Official for the Army Calls for an Inquiry in the Halliburton Case," *New York Times*, 25 October 2004. It has been revealed that the Pentagon permitted Halliburton officials to attend internal meetings regarding contracting.
- <sup>32</sup> Rupert Cornwell et al., "How the Allies Won the War, But Then Lost the Battle for Peace," *Independent* (London), 28 January 2005; Jim Krane, "Private Armies Also Fight," *St. Louis Post-Dispatch*, 30 October 2003.
- <sup>33</sup> Bhagwat, "The Privatization of War", supra note 24. For instance in the run-up to the second Iraq war, leading American PMFs gained direct access to the planning of military and intelligence operations.
- <sup>34</sup> *Government-Business Cooperation, 1945-1964: Corporatism in the Post-war Era*, ed. Robert F. Himmelberg (New York: Garland Publishing, 1994); Omar L. Carey, *The Military-Industrial Complex and United States Foreign Policy*, (Pullman, WA: Washington State University Press, 1969).
- <sup>35</sup> Sapone, "Have Rifle with Scope", supra note 12 at 10.
- <sup>36</sup> Zarate, "The Emergence of a New Dog of War", supra note 2 at 84-85.
- <sup>37</sup> *Ibid.* at 87.
- <sup>38</sup> *Ibid.* at 82.
- <sup>39</sup> See Ken Silverstein, "Privatizing War", *Nation*, 28 July 28-4 August 1997, at 17.

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- <sup>40</sup> William D. Hartung, Editorial, "The Booming Defense Business", *Los Angeles Times*, 10 December 2003; Ken Silverstein & Chuck Neubauer, "Advisor Perle Has Given Seminars on Ways To Profit from Possible Conflicts Discussed by Defense Board He Sits On", *Los Angeles Times*, May 7, 2003.
- <sup>41</sup> Juan O. Tamayo, "Private Firms Take on Jobs, Risks for U.S. Military in Andes Drug War", *Miami Herald*, 22 May 2001, at 1A
- <sup>42</sup> Zarate, "The Emergence of a New Dog of War", supra note 2 at 113.
- <sup>43</sup> Ibid. at 77.
- <sup>44</sup> Sapone, "Have Rifle with Scope", supra note 12 at 25; Roger Cohen, "U.S. Cooling Ties to Croatia After Winking at its Buildup," *New York Times*, 28 October 1995; Eric Schmitt, "Retired American Troops to Aid Bosnian Army in Combat Skills," *New York Times*, 15 January 1996; Mark Thompson, "Generals for Hire," *Time*, 15 January 1996, 34; Leslie Wayne, "America's For-Profit Secret Army," *New York Times*, 13 October 2002.
- <sup>45</sup> Gregory Copley, "Croatia Prepares for War on Eastern Slavonia", *Def. & Foreign Aff. Strategic Pol'y*, 31 October 1995, at 3.
- <sup>46</sup> Leslie Wayne, "America's For-Profit Secret Arm", *New York Times*, 13 October 2002 at C1.
- <sup>47</sup> Michaels, "Beyond Accountability", supra note 11 at 1028.
- <sup>48</sup> P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (2003) 146.
- <sup>49</sup> Clifford J. Rosky, "Force, Inc.: The Privatization of Punishment, Policing, And Military Force in Liberal States," *Connecticut Law Review* 36 (2004): 879, 911.
- <sup>50</sup> Michaels, "Beyond Accountability", supra note 11 at 1035.
- <sup>51</sup> Blackwater Security Consulting, <http://blackwatersecurity.com> (last visited 4 October 2004).
- <sup>52</sup> CACI International, <http://www.caci.com/about/profile.shtml> (last visited 4 October 2004).
- <sup>53</sup> Singer, *Corporate Warriors*, supra note 48 at 224; Philip Winslow, "Why Africa's Armies Open Arms to Elite Fighters from S. Africa," *Christian Science Monitor*, 19 October 1995.
- <sup>54</sup> Christo Johnson, "Troops Foil Coup in Sierra Leone," *Independent* (London), 4 October 1995.
- <sup>55</sup> Noting Sandline's contract to reinstate the government after Executive Outcomes left and a coup was staged. Ibid. 115; Singer, *Corporate Warriors*, supra note 48 at 112-13.
- <sup>56</sup> "Lines in the Sand," *Times* (London), 19 May 1998.

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- <sup>57</sup> See, e.g., “Arms-to-Africa: ‘Minister knew of Customs Probe’,” *BBC News*, 9 June 1998; Nick Assinder, “Arms-to-Africa Row Escalates,” *BBC News*, 25 June 1998.
- <sup>58</sup> “Report on the Sierra Leone Arms Investigation”, *Legg Report* 107, 7 July 1998.
- <sup>59</sup> *Ibid.* 107.
- <sup>60</sup> *Ibid.* 115.
- <sup>61</sup> *Parliamentary Debates, House of Lords* 591, 5th ser., 1998, WA65.
- <sup>63</sup> Zarate, “The Emergence of a New Dog of War”, *supra* note 2 at 133.
- <sup>64</sup> *Ibid.*
- <sup>65</sup> Peter W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law,” *Columbia Journal of Transnational Law* 42 (2004): 521, 525.
- <sup>66</sup> Singer, “Corporate Warriors: The Rise of the Privatized Military Industry”, *supra* note 5 at 214-15.
- <sup>67</sup> Garmon, “Domesticating International Corporate Responsibility”, *supra* note 3 at 339.
- <sup>68</sup> Singer, “Corporate Warriors: The Rise of the Privatized Military Industry”, *supra* note 5 at 214.
- <sup>69</sup> Quoted in *Wikipedia: The Free Encyclopedia*, available at [www.wikipedia.org/wiki/CACI](http://www.wikipedia.org/wiki/CACI) (last visited 19 June 2006).
- <sup>70</sup> See “Agreement Between the Department of the Interior and CACI Premier Technology, Inc., No. NBCHA010005 (2000)”, available at [http://0-www.publicintegrity.org.library.newcastle.edu.au:80/docs/wow/CACI\\_ordersAll.pdf](http://0-www.publicintegrity.org.library.newcastle.edu.au:80/docs/wow/CACI_ordersAll.pdf) (last visited 15 June 2006).
- <sup>71</sup> Department Of The Army, *Inspector Gen., Detainee Operations Inspection*, July 21, 2004, at 19-20 (Daig Report) 87-89.
- <sup>72</sup> Lynda Hurst, “The Privatization of Abu Ghraib”, *Toronto Star*, 16 May 2004, at F3.
- <sup>73</sup> Seymour M. Hersh, *Chain Of Command: The Road from 9/11 to Abu Ghraib* (2004) 53.
- <sup>74</sup> Dickinson, “Government for Hire: Privatizing Foreign Affairs”, *supra* note 1 at 152-53.
- <sup>75</sup> Max Weber, *The Theory of Social and Economic Organization*, ed. Talcott Parsons, trans. A.M. Henderson and Talcott Parsons (New York: Oxford University Press, 1947).
- <sup>76</sup> Kenneth Bredemeier, “Thousands of Private Contractors Support U.S. Forces in Persian Gulf”, *Washington Post*, 3 March 2003, at E01.
- <sup>77</sup> See *DOD, Regulation 5000.2-R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPS) And Major Automated Information System (MAIS)*

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<sup>78</sup> *Army Field Manual No. 100-21, Contractors on the Battlefield* 1-1 (2000).

<sup>79</sup> Herbert M. Howe, "Global Order and the Privatization of Security", *Fletcher Forum of World Affairs* 22 (1998) 1, 7.

<sup>80</sup> John O. McGinnis, "The Decline of the Western Nation States and the Rise of the Regime of International Federalism", *Cardozo Law Review* 18 (1996): 903, 905; Anne-Marie Slaughter, *A New World Order*, (Princeton, NJ: Princeton University Press, 2004).